

1 Q So, in fact, you do control for
2 size in your regression, right?

3 A I do.

4 Q So adding another smaller MVPD
5 shouldn't have the effect of increasing
6 Comcast's price?

7 A It would.

8 Q Wouldn't that suggest that there
9 is a problem with your regression?

10 A No, it's not. If you -- in any
11 regression, if you take out an observation and
12 you put in a different observation, depending
13 upon the sample size, you can effect the
14 parameters that are being estimated.

15 Q Let's talk about a few sort of
16 background issues first. And then we can
17 delve into things in a little more detail. I
18 want to just make sure that we have a common
19 understanding of some terms that I think are
20 in your report and are in some of the other
21 reports that show up in this case.

22 First off, we often hear the word

1 "MVPD." And that stands for multi-channel
2 video programming distributor. Is that right?

3 A That is right. It's also used as
4 MVPD services, in which the D stands for
5 distribution.

6 Q And so that is an umbrella term
7 that covers a lot of different types of
8 companies, right?

9 A Correct.

10 Q And just take some examples of the
11 types of companies that fall under that
12 umbrella just so we have a common
13 understanding.

14 So one type of company is cable
15 companies, right?

16 A Correct.

17 Q And sometimes those are referred
18 to as MSOs. You are familiar with that term?

19 A Yes, I am.

20 Q I think that stands for multiple
21 system operator or something like that, right?

22 A Sounds right.

1 Q And companies like Comcast and
2 Time Warner and Charter and Cablevision, those
3 are traditional cable companies, right?

4 A Yes, they are.

5 Q So we've got the cable companies.
6 And they are MVPDs, correct?

7 A And one class of MVPD.

8 Q Right. And then there's another
9 class of MVPD called satellite providers,
10 right?

11 A Correct.

12 Q They're sometimes abbreviated as
13 DBS or direct broadcast satellite, right?

14 A Correct.

15 Q And there are really principally
16 two of those in the United States. There is
17 DirectTV, and there is EchoStar, right?

18 A Among the satellite providers,
19 yes.

20 Q Right. And the EchoStar is
21 sometimes referred to as the DISH Network,
22 right?

1 A Correct.

2 Q And then I guess there is a third
3 category of MVPDs, which are sometimes called
4 overbuilders. Are you familiar with that
5 term?

6 A Sure.

7 Q I guess there are some
8 overbuilders that have been in the business
9 for a long time. And they are companies like
10 RCN. Are you familiar with them? They are an
11 overbuilder?

12 A Yes, I am.

13 Q And there is a company called Wide
14 Open West. They are an overbuilder?

15 A Yes.

16 Q They are sometimes abbreviated
17 WOW?

18 A They're starred at the bottom.
19 Yes, I'm aware of it.

20 Q And then there are also some newer
21 entrants into the overbuilder business. Those
22 are the telco companies, right, the --

1 A Correct, AT&T and Verizon.

2 Q So these are the companies that
3 were traditionally telephone companies that
4 have entered the video business. And they are
5 now MVPDs as well?

6 A Correct.

7 Q So does that cover the general
8 universe of MVPDs?

9 A I think so.

10 Q There may be a few other smaller
11 types of companies, but those are the
12 principal categories. Is that fair?

13 A That's very fair.

14 Q Now, one of the things that you
15 talked about in your deposition testimony and
16 in your report which we didn't hear about at
17 all during your spoken testimony here today
18 was your market penetration test. Do you
19 remember that?

20 A Yes, I do.

21 Q And your market penetration test
22 basically was another test that you used to

1 evaluate whether there had been
2 discrimination. Isn't that right?

3 A Not really. It was a response to
4 a suggestion made by your expert that -- I'm
5 paraphrasing -- that we should only look to
6 the decisions of the out-of-region cable
7 operators when deciding whether or not NFL
8 Network has received wide penetration.

9 Q I mean, just to be specific, you
10 defined this in your testimony, your
11 deposition testimony, something called Hal's
12 penetration test. Do you recall that?

13 A Yes, I do.

14 Q And you referred to that as a
15 third prong of the analysis. Isn't that
16 right?

17 MR. SCHMIDT: Objection.

18 THE WITNESS: No.

19 MR. SCHMIDT: That's not really
20 what he said. If you want to ask him about
21 his testimony, you should put it in front of
22 him.

1 MR. BURKE: Well, I would like to
2 hear what the witness' recollection is first.

3 JUDGE SIPPEL: I am going to
4 overrule the objection the way it's foreseen,
5 but just be careful. Just don't go too fast
6 for the witness.

7 THE WITNESS: As you know, it's on
8 the order of how these ideas came about. In
9 my declaration, I did not have a market
10 penetration test. The idea was prompted as a
11 response to what your expert put forward as an
12 efficiency basis.

13 Your expert said, "Look at the
14 non-carriage decisions of the out-of-region
15 cable operators." That should inform what I
16 am calling the phase one analysis.

17 And I said, "Fine. But if we are
18 going to look at those non-carriage decisions,
19 we have to also look at the carriage decisions
20 of all the other MVPDs," including, most
21 importantly, the Comcast in-region rivals.

22 And so my market penetration test

1 is an attempt to give proper weighing to all
2 of those votes. Some people vote yes, NFL.
3 Some people vote no. I don't want to ignore
4 any of them.

5 BY MR. BURKE:

6 Q You used some terms there. I want
7 to make sure that we all have an understanding
8 of what they mean. You referred to in-region
9 rivals and out-of-region companies. Did I
10 hear you correctly?

11 A Uh-huh.

12 Q And in-region rivals, you use
13 those terms to refer to companies that
14 actually compete directly with Comcast. Is
15 that right?

16 A Right, that compete in the same
17 geographic markets that are served by Comcast.
18 Just to be clear for Your Honor, Comcast
19 doesn't cover the entire country. It covers
20 certain cities. So it's a patchwork.

21 There are other incumbent cable
22 operators that cover other parts of the

1 country.

2 Q So, for example, DirectTV is an
3 in-region rival of Comcast because it competes
4 with Comcast in aspects of Comcast's
5 footprint; in fact, all of Comcast's
6 footprint?

7 A Correct.

8 Q Now, the reverse is not true.
9 Comcast does not compete with DirectTV
10 everywhere that DirectTV operates, right?

11 A That is a very fair point.

12 Q So DirectTV is ubiquitous because
13 it's a satellite service, right? It serves
14 the whole country, essentially?

15 A Correct.

16 Q And the DISH Network, EchoStar is
17 similar. It serves the whole country, right?

18 A Correct.

19 Q So those companies will compete
20 with Comcast. They will also compete with
21 Time Warner. They will also compete with
22 Charter, right?

1 A Correct.

2 Q But Time Warner and Comcast don't
3 compete with each other because they're in
4 different geographic areas?

5 A I want to say that the most
6 prominent competitors are the in-region
7 competitors. And that's DirectTV and EchoStar
8 and Verizon and AT&T and RCN. And it is fair
9 that Time Warner to the extent that it doesn't
10 overlap with Comcast is not as direct a
11 competitor with Comcast?

12 Q And we talked about the
13 overbuilders, companies like RCN and Wide Open
14 West. They may in certain instances be
15 in-region rivals of Comcast as well, right?

16 A Yeah, yes, not to exclude Verizon
17 and AT&T as overbuilders per your designation
18 earlier.

19 Q Well, I would like to ask you some
20 questions about what you referred to as Hal's
21 penetration test.

22 MR. BURKE: And so I think we have

1 an exhibit that we would like to mark for
2 identification. If I may, Your Honor?

3 JUDGE SIPPEL: Yes, please. This
4 is Comcast exhibit 420.

5 (Whereupon, the aforementioned
6 document was marked for
7 identification as Comcast Exhibit
8 Number 420.)

9 JUDGE SIPPEL: We need one for the
10 witness.

11 MR. BURKE: We have it, Your
12 Honor. Sorry. We didn't mean to keep you
13 waiting.

14 BY MR. BURKE:

15 Q Now, we printed this out, Dr.
16 Singer, from some of the data files that we
17 received from your counsel. And I would like
18 you to tell me if you recognize this document.

19 A I do.

20 Q Can you tell us what it is?

21 A Sure. It is an attempt to give
22 proper weight, as I said, to the votes of yes

1 and no. And it's weighting in the first
2 instance by how many subscribers the MVPD has.

3 JUDGE SIPPEL: A weighting, a yes
4 or no survey or --

5 THE WITNESS: No. So by the vote,
6 I mean, some of MVPDs, some of the top ten
7 MVPDs -- I limited this to the top ten,
8 incidentally, because the FCC in its MVPD
9 annual reports only provides shares for the
10 top ten MVPDs in the country.

11 So if you set aside Comcast, which
12 is the subject firm here -- so we don't want
13 to allow their decision not to carry to
14 contaminate this analysis.

15 We want to know how much
16 penetration has the NFL achieved among the
17 remaining top ten MVPD subscribers. It's a
18 natural question as to how do you weight the
19 carriage decisions of each MVPD in the sample.

20 If a big guy says yes, then he
21 should get more weight in my opinion. And if
22 a little guy says no, then his decisions

1 should be recorded. But he should get less
2 weight.

3 MR. BURKE: So I would like to
4 move the next exhibit.

5 JUDGE SIPPEL: So it's identified.
6 What can we call it as an identification? It
7 doesn't have a heading to it.

8 MR. BURKE: Dr. Singer's
9 penetration test. Shall we say that?

10 JUDGE SIPPEL: Is that fair?

11 THE WITNESS: I like market
12 penetration.

13 JUDGE SIPPEL: Market penetration
14 test? Is it a test?

15 THE WITNESS: Yes, it's market
16 penetration test.

17 JUDGE SIPPEL: All right. Let's
18 call it a market penetration test. And it was
19 prepared by Dr. Singer. Is that right?

20 MR. BURKE: Correct.

21 BY MR. BURKE:

22 Q And this looks like an accurate

1 reproduction of the analysis you did, Dr.
2 Singer, right?

3 JUDGE SIPPEL: That's identified
4 as exhibit Comcast number 420 for
5 identification. Now you want to move it into
6 evidence at this time.

7 MR. BURKE: I do, Your Honor.

8 JUDGE SIPPEL: Any objections?

9 MR. SCHMIDT: No objection. Your
10 Honor.

11 JUDGE SIPPEL: It's received as
12 Comcast exhibit 420.

13 (Whereupon, the aforementioned
14 document, having previously been
15 marked for identification as
16 Comcast Exhibit Number 420, was
17 received in evidence.)

18 BY MR. BURKE:

19 Q Now, this document shows the top
20 ten MVPDs as of 2006. Is that right, Dr.
21 Singer?

22 A Yes. That is the latest date at

1 which the FCC's reports provide such data.

2 Q I just want to run through them
3 and understand how your client's service is
4 carried by each of these services. So
5 Mediacom does not carry the NFL Network at
6 all. Is that right?

7 A Correct.

8 Q And Brighthouse does not carry the
9 NFL Network at all. Is that right?

10 A Correct.

11 Q And Cablevision does not carry the
12 NFL Network at all. Is that correct?

13 A Correct.

14 Q Cox, which is a cable company,
15 does carry the NFL Network. Is that right?

16 A Correct.

17 Q And they don't carry it on their
18 analog tier, though, right?

19 A I don't know the exact name of the
20 tier, but I do have on the next page the
21 penetration. 32.5 percent of Cox's
22 subscribers get the NFL Network.

1 Q And I would suggest that that is
2 not the most widely penetrated tier, correct?

3 A That's fair. It wouldn't be the
4 most widely penetrated tier.

5 Q When we talk about the penetration
6 rates of tiers, it's obviously the more
7 valuable or at least some programmers like to
8 be distributed more widely. Isn't that right?

9 A I would say all programmers in
10 this industry; that is, national sports
11 networks, want to be distributed more widely.
12 I can't think of any exceptions to that.

13 Q But, for example, there are some
14 cable channels, like HBO, which choose to be
15 distributed relatively narrowly but charge a
16 high price for themselves, right?

17 A And that is not a national sports
18 network.

19 Q Okay.

20 A But you can certainly find counter
21 examples within the broader programming
22 industry.

1 Q Right. And so cable companies
2 have various tiers. And it's fair to say that
3 Cox has not distributed the NFL Network on its
4 most widely penetrated tier, right?

5 A Not the most widely, but, you
6 know, 32 is -- it's a significant number.
7 It's not zero.

8 Q And, in fact, it's not even their
9 digital tier. It's not the equivalent of the
10 D2 tier that Comcast had. Isn't that right?

11 A I would have to divide [REDACTED]
12 by [REDACTED] to figure out the D2 tier. But
13 I don't know if I can do that in my head.

14 Q So as part of your analysis, you
15 didn't look at whether Cox carried the NFL
16 network on the D2 digital tier?

17 A I looked at what the penetration
18 rate does, which subsumes the name of the
19 tier. The name of the tier is not important
20 to me.

21 Q But, I mean, the level of
22 penetration is. There are certainly tiers

1 that are more widely penetrated on Cox than
2 this tier, correct?

3 A I think that is a fair inference.

4 Q Now, Adelphia we have skipped. It
5 no longer exists. Charter does not carry the
6 NFL Network. Is that right?

7 A Correct.

8 Q Now, your client has sued Charter.
9 Isn't that correct? There was a litigation
10 between the NFL Network and Charter?

11 A I am not aware if they did.

12 Q The next on the list is the Time
13 Warner. And they don't carry the NFL Network
14 either, do they?

15 A Correct.

16 Q And then we get to EchoStar, which
17 is also called the DISH Network. And this
18 indicates that they do carry the NFL Network.
19 Is that right?

20 A Correct.

21 Q And there is a penetration rate
22 listed of 81 percent. That is no longer

1 correct, is it?

2 A It is now -- in light of the new
3 contract that was presented to me after I
4 supplied this to you, the 81 percent number
5 that appears there would need to be updated to
6 70 percent. But the 81 percent was accurate
7 at the time given the information that I had.

8 Q I guess I had heard it was 60
9 percent. What is the source of the 70
10 percent?

11 A I looked at the contract, if not
12 last night, the night before. And I remember
13 seeing the number 70 in the contract.

14 Q What happened is that essentially
15 the DISH Network used to have NFL Network on
16 its most widely distributed tier. And it
17 basically moved it to a less distributed tier.
18 Is that correct?

19 A I don't know if it was ever
20 carried on the most penetrated tier. They
21 have a very, very small tier, AT-50.

22 And I'm sure that NFL Network was

1 ever carried on that tier. But what I will
2 grant you is that at some point in time, they
3 lowered the penetration from 81 to 70.

4 Q So they basically took it up a
5 tier, correct?

6 A I don't know if --

7 Q They took it to a different tier
8 that is less penetrated, right?

9 A Correct but still significantly
10 penetrated.

11 Q And then we have DirecTV, which
12 does carry the NFL Network. And then we have
13 Comcast, which also carries the NFL Network,
14 right?

15 A Right. For reasons I -- I
16 excluded Comcast from this analysis because I
17 didn't want their decision, which I believe is
18 based on for anti-competitive reasons to
19 contaminate my penetration test.

20 Q So, just to sum up, the majority
21 of these MVPDs don't carry the NFL Network.
22 Is that right?

1 A The majority within the top ten as
2 of 2006 do not. The top ten has changed,
3 obviously. Verizon, for example, has come
4 into the top ten. Now Verizon carries it.
5 This table doesn't include RCN. It doesn't
6 include the 240 odd MVPDs that do carry --

7 Q Among this list of MVPDs, the
8 majority does not carry the NFL Network.
9 Isn't that right?

10 A That is absolutely right.

11 Q And, in fact, Comcast carries the
12 NFL Network more, on a greater level of
13 penetration than the majority of MVPDs on this
14 list. Isn't that correct?

15 A Certainly with respect to the
16 other cable operators, that is true. I
17 haven't -- I could go through and do the
18 counting for you, but --

19 Q I am just asking you about --
20 there are ten companies on this list. Comcast
21 carries it on a more penetrated basis than the
22 majority of these companies. Isn't that

1 right?

2 A Yes, five out of nine. Correct.

3 Q Now, you have mentioned that there
4 are 240 other companies that carry the NFL
5 Network. Is that right?

6 A Yes, some of whom have now crept
7 into the top ten.

8 Q I think you heard Mr. Hawkins'
9 testimony earlier that there are thousands and
10 thousands of MVPDs in America. Isn't that
11 right?

12 A Right. But when you go beyond, if
13 you look right here, when you go beyond the
14 top 10, you have already accounted for 87
15 percent of all MVPD subs in the country. So,
16 of course, we could find a guy who serves two
17 subscribers, but that wouldn't be as
18 meaningful to me.

19 Q Dr. Singer, if you could just try
20 to answer my question with a "Yes" or "No" if
21 at all possible, it will help us expedite all
22 of this. It's a simple question. There are

1 thousands and thousands of MVPDs in the
2 country? That's what I asked you.

3 I asked you whether you heard Mr.
4 Hawkins' testimony. Did you hear Mr. Hawkins'
5 testimony on that?

6 A I heard the exchange, yes. And I
7 heard what I thought was a misleading
8 suggestion that the 10,000th largest provider
9 had a significant share.

10 Q Dr. Singer, it will really help
11 the process if you just answer my questions.

12 A Okay.

13 Q Okay? Did you hear Mr. Hawkins
14 say that there are thousands of MVPDs, "Yes"
15 or "No"?

16 A I believe I heard him say that.

17 Q Now, and you say that most of
18 those MVPDs are very tiny, right?

19 A The vast majority would be very
20 tiny.

21 Q And that's true of the 240 MVPDs
22 that you cite that supposedly carry the NFL

1 Network. The vast majority of them are
2 actually very tiny as well?

3 A The vast majority of them are --
4 within the 240, there are some very large
5 MVPDs.

6 Q But it is certainly true to say
7 that, as a percentage matter, the substantial
8 majority of MVPDs in the United States do not
9 carry the NFL Network today at all?

10 A It depends on how you define
11 "majority." If you're asking me to give
12 everyone equal weight, I will acknowledge to
13 you -- and I didn't do that in this table. If
14 you're asking me to do a different analysis
15 where I don't apply weights, I just treat
16 everyone equally, then yes, the majority among
17 the top ten do not carry NFL Network.

18 Q Thank you. Let's see. All right.
19 Now, in your testimony, your written
20 testimony, Dr. Singer, you criticize my client
21 for pointing to the cable companies as
22 examples of companies that don't carry the NFL

1 Network. Do you recall that, saying that it's
2 not a proper alternative to focus on?

3 A To characterize my testimony
4 correctly, it's not fair to exclusively
5 consider the carriage decisions of the other
6 cable operators. That's what I don't think is
7 fair.

8 Q Okay. It's appropriate to
9 consider them, though. Is that right?

10 A I think that if -- to the extent
11 that such a market penetration test could
12 inform what I'm calling this phase one
13 inquiry, then I think it is appropriate to
14 consider both the decisions of Comcast,
15 out-of-region cable MVPDs, cable operators,
16 and in-region MVPDs as well.

17 Q You argue in your testimony,
18 though, that you should put more weight on the
19 so-called in-region rivals than on the
20 out-of-region cable companies. Isn't that
21 right?

22 A Correct.

1 Q And I would probably cite a number
2 of different reasons to support that argument.
3 I want to run through them with you if that's
4 all right.

5 A Sure. Just to be clear, I made
6 that assertion twice: once with respect to
7 the valuation exercise and once with respect
8 to what I call phase one. It might help me if
9 you just set me up with which one of those two
10 we're going to go through.

11 Q I guess I'm not sure I kind of
12 accept the concept of phase one here, but
13 let's focus on it from -- because I think that
14 is derived from a legal precedent that we
15 don't necessarily consider valid.

16 A Okay.

17 Q But let's focus on the question.
18 Let's go to Hal's penetration rate or Hal's
19 market penetration rate.

20 A Okay.

21 Q I think you were saying that for
22 evaluating market penetration, you should